

Message Text

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ACTION AF-08

INFO OCT-01 EUR-12 IO-13 ISO-00 CIAE-00 DODE-00 NSAE-00

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FM AMEMBASSY PRETORIA
TO SECSTATE WASHDC IMMEDIATE 5571
INFO AMEMBASSY BONN
AMEMBASSY LONDON
USMISSION USUN NEW YORK

LIMITED OFFICIAL USE SECTION 1 OF 2 PRETORIA 4214

E.O. 11652: N/A
TAGS: SF WA PBOR
SUBJ: STATUS OF ISLANDS OFF NAMIBIAN COAST

1. RESPONDING TO U.S. NOTE REQUESTING INFORMATION AND ADDITIONAL DOCUMENTATION ON THE STATUS OF THE SEVERAL ISLANDS OFF THE COAST OF SOUTHWEST AFRICA, THE DEPARTMENT OF FOREIGN AFFAIRS FURNISHED THE FOLLOWING REPLY ON SEPT. 17. NOTE WAS NOT CLASSIFIED BUT MENTIONED THE DESIRE THAT CERTAIN SECTIONS OF THE OPINION BE HELD "CONFIDENTIAL". APPROXIMATELY 20 PAGES OF DOCUMENTARY ANNEXES WERE ATTACHED TO THE NOTE AND ARE BEING POUCHED TO THE DEPARTMENT.

2. QUOTE:
THE DEPARTMENT OF FOREIGN AFFAIRS PRESENTS ITS COMPLIMENTS TO THE EMBASSY OF THE UNITED STATES OF AMERICA AND HAS THE HONOUR TO REFER TO THE EMBASSY'S NOTE OF 1 SEPTEMBER 1976 REGARDING THE TERRITORIAL STATUS OF THE PENGUIN ISLANDS OFF THE COAST OF SOUTH WEST AFRICA.

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IT HAS ALWAYS BEEN AND REMAINS THE POSITION OF THE SOUTH AFRICAN GOVERNMENT THAT THERE CAN BE NO DOUBT THAT IN ACCORDANCE WITH INTERNATIONAL LAW THE TWELVE ISLANDS IN QUESTION, VIZ. ICHABOE, HOLLAMSBIRD, MERCURY, LONG, SEAL, PENGUIN, HALIFAX, POSSESSION, ALBATROSS ROCK, POMONA, PLUM PUDDING AND SINCLAIR'S (FORMERLY ALSO KNOWN AS "ROAST BEEF") ARE SOUTH AFRICAN TERRITORY.

THE POSITION OF THE GOVERNMENT IS BASED, INTER ALIA, ON INFORMATION CONTAINED IN THE BRITISH AND FOREIGN STATE PAPERS, MANY OF WHICH ARE REFERRED TO IN THE EMBASSY'S NOTE; HERTSLET (THE MAP OF AFRICA BY TREATY, 3RD EDITION); THE VARIOUS RELEVANT LEGAL INSTRUMENTS; AND THE IMPERIAL BLUE BOOKS RELATING TO SOUTH AFRICA, C - 4190, C - 4262 AND C - 5180; AS WELL AS ON LEGAL OPINIONS FURNISHED BY THE STATE LAW ADVISERS. IN ARRIVING AT THEIR CONCLUSIONS, THE STATE LAW ADVISERS ALSO HAD REGARD TO A LEGAL OPINION OF 1963 FURNISHED TO A CLIENT BY THE BRITISH PUBLICIST, MR E. LAUTERPACHT, IN WHICH HE QUOTES RELEVANT EXTRACTS FROM THE (BRITISH) FOREIGN OFFICE CONFIDENTIAL PRINT NO. 5060 (NOW NO LONGER CONFIDENTIAL) AND FROM OTZEN (HISTORICAL REVIEW OF DIAMOND TAXATION AND MINING LEGISLATION IN SOUTH WEST AFRICA, 1952).

WHILE, FOR ETHICAL REASONS, IT WOULD BE APPRECIATED IF MR LAUTERPACHT'S OPINION COULD BE TREATED AS CONFIDENTIAL, IT MAY BE OF INTEREST TO THE EMBASSY THAT HE SUMMARIZED THE POSITION REGARDING SOVEREIGNTY OVER THE ISLANDS - AGAINST THE INTEREST OF HIS CLIENT - AS FOLLOWS:

"THERE ARE TWO KEY INSTRUMENTS: -

(1) THE LETTERS PATENT OF 1867 BY WHICH CERTAIN ISLANDS WERE NAMED AND WERE ANNEXED TO THE BRITISH CROWN. THE CAPE OF GOOD HOPE STATUTE OF 1874 SECURED THE VESTING IN THE COLONY OF THESE SAME NAMED ISLANDS.

(2) THE PROTOCOL OF 1886 BETWEEN GREAT BRITAIN AND GERMANY WHICH DRAWS A DISTINCTION BETWEEN THE ISLANDS NAMED LIMITED OFFICIAL USE

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IN THE 1867 LETTERS PATENT AND THOSE WHICH ARE NOT SO NAMED. THE FORMER ARE RETAINED BY THE CAPE COLONY AND DEVOLVE IN DUE COURSE UPON THE REPUBLIC; WHILE THE LATTER ARE VESTED IN GERMANY, ADHERE TO THE PROTECTORATE OF SOUTH WEST AFRICA AND, IN DUE COURSE, PASS INTO THE CONTROL OF THE ADMINISTRA-

TOR OF S.W.A. AS PART OF S.W.A."

NEITHER THE STATE LAW ADVISERS NOR MR LAUTERPACHT HAD BEFORE THEM INFORMATION RELATING TO THE FINAL TERMS OF REFERENCE OR THE NEGOTIATIONS OF COMMISSIONERS BIEBER AND SHIPPARD TO WHICH THE EMBASSY REFERS. HOWEVER, EVEN IN THE ABSENCE OF SUCH INFORMATION IT WAS THE OPINION OF THE STATE LAW ADVISERS, WHICH IS SHARED BY THE GOVERNMENT, THAT IT IS "IMPLICIT IN PARAGRAPH 4 OF THE 1886 PROTOCOL THAT GERMANY RECOGNIZED THE RIGHT AND TITLE OF BRITAIN TO THE '12 BRITISH ISLANDS NAMED IN THE LETTERS PATENT OF THE 27TH OF FEBRUARY 1867' AND THAT BRITAIN WAIVED ALL CLAIM ONLY TO THESE (I.E. THE UNNAMED - SEE THE HEADING TO PARAGRAPH 4) ISLETS AND ROCKS". IT WAS THE VIEW OF THE LAW ADVISERS THT IN THE LIGHT OF THE WHOLE HISTORY OF THE MATTER AND PARTICULARLY THE SUDDEN GERMAN DOUBTS EXPRESSED IN THE NOTE OF OCTOBER 8, 1884 (BRITISH AND FOREIGN STATE PAPERS, VOLUME 75, PAGE 552), THE PROTOCOL OF 1886 WOULD SURELY HAVE REGULATED THE TERRITORIAL STATUS OF THE TWELVE ISLANDS HAD ANY DOUBTS REMAINED - AND THAT, EQUALLY SURELY, PARAGRAPH 4 OF THE PROTOCOL WOULD NOT HAVE REFERRED TO THE "12 BRITISH ISLANDS" HAD BOTH PARTIES NOT IN FACT REGARDED THEM AS BRITISH.

THE CORRECTNESS OF THESE VIEWS IS CONFIRMED AND, INDEED, PLACED BEYOND DOUBT BY DOCUMENTS RELATING TO THE MIXED COMMISSION WHICH MET IN CAPE TOWN IN 1885. SINCE SOME OF THE DOCUMENTS MAY NOT BE READILY AVAILABLE TO THE UNITED STATES EMBASSY, THE DEPARTMENT OF FOREIGN AFFAIRS HAS PLEASURE IN ATTACHING NUMBERED COPIES OF THOSE WHICH ARE PARTICULARLY RELEVANT TO THE EMBASSY'S ENQUIRY, WITH THE MORE PERTINENT PASSAGES UNDERLINED.

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THESE AND OTHER DOCUMENTS MAKE IT PERFECTLY CLEAR THAT
DESPITE THE DOUBTS EXPRESSED BY GERMANY IN ITS NOTE OF 8
OCTOBER 1884, THE QUESTION OF THE TERRITORIAL STATUS OF THE
ISLANDS CONCERNED WAS NEVER CONSIDERED BY COMMISSIONERS BIEBER
AND SHIPPARD AND WAS IN FACT SPECIFICALLY EXCLUDED FROM THE
SCOPE OF THEIR ENQUIRY. THE REASON FOR THIS IS APPARENT.
BOTH BEFORE AND AFTER RECEIPT OF THAT NOTE THE BRITISH AS
WELL AS THE CAPE GOVERNMENTS HAD VIGOROUSLY MAINTAINED THE
UNASSAILABILITY OF GREAT BRITAIN'S TITLE TO THE TWELVE
ISLANDS NAMED IN THE LETTERS PATENT OF 1867 (SEE, FOR EXAMPLE,
IMPERIAL BLUE BOOKS; C - 4262 AT PAGES 12, 13, 23, 53, 70 - 71;
C - 5180 AT PAGES 2 AND 4). IN THE FACE OF GREAT BRITAIN'S
STEADFAST REFUSAL TO ALLOW ANY DISCUSSION OF THE MATTER BY
THE MIXED COMMISSION, GERMANY ABANDONED ITS POSITION THAT THE
COMMISSION WOULD "HAVE TO EXAMINE AND REPORT UPON" THE QUESTION
AND ACKNOWLEDGED GREAT BRITAIN'S CLAIM TO SOVEREIGNTY OVER
THE ISLANDS. THUS ON 11 MARCH 1885, BISMARCK INSTRUCTED
BIEBER, THE GERMAN COMMISSIONER, INTER ALIA, THAT -
"THE SCOPE OF THE INQUIRY OF THE JOINT COMMISSION,
ON WHICH YOU HAD BEEN DESIGNATED TO THE BRITISH
GOVERNMENT AS OUR COMMISSIONER, WAS SPECIFIED IN
MY DESPATCH OF THE 19TH OCTOBER LAST IN ACCORD-
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ANCE WITH THE STATE OF THE NEGOTIATIONS BETWEEN
THE TWO GOVERNMENTS AT THAT TIME.
A DIFFERENCE OF OPINION WHICH SUBSEQUENTLY AROSE
WITH RESPECT TO THE ISLANDS OFF THE COAST OF ANGRA
PEQUENA HAS BEEN SETTLED IN THE COURSE OF LAST
MONTH.
BY A DESPATCH FROM LORD DERBY, DATED THE 17TH
ULTIMO, HIS EXCELLENCY SIR HERCULES ROBINSON HAS
BEEN REQUESTED TO COMMUNICATE INSTRUCTIONS TO YOUR
BRITISH COLLEAGUE, MR SHIPPARD, AND THE LAST
OBSTACLE TO THE COMMENCEMENT OF THE NEGOTIATIONS
HAS BEEN REMOVED BY MR. DE PASS' RENUNCIATION
(BROUGHT TO MY KNOWLEDGE ON THE 22ND ULTIMO), OF
HIS DEMAND TO APPEAR IN PERSON BEFORE THE COMMISSION.
YOU WILL THEREFORE ENTER ON THE SAME AS SOON
AS MR SHIPPARD IS READY TO DO SO, AND THE
FOLLOWING INSTRUCTIONS WILL SERVE FOR YOUR
GUIDANCE.

ON THE ONE SIDE OUR PROTECTORATE BETWEEN THE MOUTH OF THE ORANGE RIVER AND CAPE FRIO, WITH THE EXCEPTION OF WALFISCH BAY AND THE SMALL SURROUNDING TERRITORY, THE BOUNDARIES OF WHICH ARE LAID DOWN ON THE ENGLISH ADMIRALTY CHART AND IN THE ANNEXATION ACT OF THE 22ND JULY 1884, AND ON THE OTHER SIDE, THE BRITISH SOVEREIGNTY OVER THE ISLANDS NAMED IN THE LETTERS PATENT OF THE 27TH FEBRUARY 1867 ARE TO BE BEYOND DISCUSSION". (ANNEXURE 5)

AT THE FIRST MEETING OF THE MIXED COMMISSION, BIEBER ACKNOWLEDGED THAT THE COMMISSION WAS TO CONSIDER CLAIMS ONLY IN RESPECT OF ISLANDS, ISLETS AND ROCKS "NOT ANNEXED BY NAME TO THE CAPE COLONY IN 1874" (ANNEXURE 7) WHILE AT THE THIRD MEETING HE STATED THAT HIS AMENDED INSTRUCTIONS EXCLUDED CONSIDERATION OF THE QUESTION OF "THE RIGHT OF SOVEREIGNTY" OVER THE TWELVE NAMED ISLANDS ANNEXED TO THE CAPE COLONY (ANNEXURE 8). AT A LATER MEETING HE MAINTAINED THAT THE POWERS OF THE GOVERNOR OF THE CAPE, SIR PHILIP WODEHOUSE, "AS GOVERNOR OF THE ISLANDS OF ICHABOE AND THE PENGUIN ISLANDS" WERE LIMITED BY THE LETTERS PATENT TO GRANTING A LEASE OF ONLY THE TWELVE NAMED ISLANDS. (ANNEXURE 9)

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THE QUESTIONS UPON WHICH BIEBER AND SHIPPARD COULD NOT REACH AGREEMENT WERE REFERRED TO COMMISSIONERS KRAUEL AND SCOTT IN BERLIN IN 1886 (ANNEXURE 10) WHO EVENTUALLY PRODUCED AND SIGNED THE PROTOCOL OF 15 JULY 1886. AN ENCLOSURE TO THE REPORT OF THE COMMISSION WAS A MEMORANDUM DRAWN UP BY DR GOHRING SETTING FORTH THE ARGUMENTS OF THE GERMAN GOVERNMENT (ANNEXURE 6). THIS MEMORANDUM, LIKE THE PROTOCOL, DID NOT SPECIFICALLY ADDRESS THE QUESTION OF SOVEREIGNTY OVER THE TWELVE NAMED ISLANDS SINCE THIS WAS NOT IN ISSUE BEFORE THE BERLIN COMMISSION. THE POSITION OF THE GERMAN GOVERNMENT ON THIS QUESTION NEVERTHELESS APPEARS FROM DR GOHRING'S STATEMENT THAT THE LEASE OF CERTAIN ISLANDS BY SIR PHILIP WODEHOUSE WAS INVALID ONLY AS FAR AS IT CONCERNED THE ISLANDS NOT NAMED IN THE LETTERS PATENT OF 1867 AND HIS FURTHER STATEMENT THAT "THE INQUIRY HAS SHOWN THAT THE ONLY ISLANDS POSSESSING ANY VALUE ARE THE 11 (SIC) WHICH ARE UNDOUBTEDLY BRITISH PROPERTY". (ANNEXURE 6, PAGE 53).

THE DEPARTMENT OF FOREIGN AFFAIRS AVAILS ITSELF OF THIS OPPORTUNITY TO RENEW TO THE EMBASSY OF THE UNITED STATES OF AMERICA THE ASSURANCE OF ITS HIGHEST CONSIDERATION.

LIST AND SOURCES OF ANNEXURES

IMPERIAL BLUE BOOKS RELATING TO SOUTH AFRICA, 1887, C - 5180

PAGE 6, NO. 10 26 MARCH 1885 - ANNEXURE 1
PAGES 6-- 7, ENCLOSURE IN NO. 10, 11 MARCH 1885 - ANNEXURE 2
PAGE 20, INSTRUCTIONS, 16 MARCH 1885 - ANNEXURE 3
PAGE 20, INSTRUCTIONS, 24 APRIL 1885 - ANNEXURE 4
PAGES 20--21, (TRANSLATION), 11 MARCH 1885 - ANNEXURE 5
PAGES 52--54, SUB-ENCLOSURE 3, UNDATED - ANNEXURE 6
PAGE 37, MO. 52 AND ENCLOSURE, 19 MARCH 1886 - ANNEXURE 10

DOCUMENTS OF THE CAPE ARCHIVES RELATING TO ANGRA PEQUENA AND
WEST COAST CLAIMS JOINT COMMISSION : VOLUME 21 / 17 :

MINUTES OF PROCEEDINGS:

MEETING OF 14 MARCH 1885, PAGES 1 - 2 - ANNEXURE 7
MEETING OF 19 MARCH 1885, PAGES 5 - 7 - ANNEXURE 8
MEETING OF 28 JULY 1885, PAGES 81, 85 - 86 - ANNEXURE 9

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Message Attributes

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Disposition Date: 28 MAY 2004
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